

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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In the Matter of

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Implementation of the  
Telecommunications Act of 1996;

Telemessaging, Electronic Publishing,  
and Alarm Monitoring Services

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) CC Docket No. 96-152  
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COMMENTS OF TIME WARNER CABLE

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**COMMENTS OF TIME WARNER CABLE**

Time Warner Cable, a division of Time Warner Entertainment Company, L.P. ("Time Warner"), hereby submits its Comments in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY.**

In this proceeding, the Commission proposes to adopt rules implementing the structural separation and nondiscrimination safeguards mandated by Congress in sections 274, 275 and 260 of the Telecommunications Act of 1996.<sup>2</sup> These safeguards will govern BOC provision of electronic publishing, alarm monitoring and telemessaging services, respectively.

The 1996 Act is intended "to provide for a pro-competitive de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications

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<sup>1</sup> Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services, CC Docket No. 96-152, Notice of Proposed Rulemaking, FCC 96-310 (released July 18, 1996) ("Notice").

<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

and information technologies and services to all Americans by opening all telecommunications markets to competition."<sup>3</sup> To promote such a result, Congress directed the Commission to implement structural and nonstructural safeguards to protect BOC subscribers and competitors from cross-subsidization, discrimination and monopoly leveraging upon BOC entry into the provision of electronic publishing services. The proper implementation of safeguards for the BOC provision of electronic publishing services is of interest to both Time Warner's non-video and video services.

- Time Warner urges the Commission to vigorously enforce the 1996 Act's restrictions on BOC in-region provision of electronic publishing, be it through a separated affiliate or a joint venture. Further, to fulfill the goals of the 1996 Act, the Commission must implement additional regulations to give force and effect to the specific provisions of section 274.
- Section 274 directs the Commission to implement safeguards to prevent against the cross-subsidization of, joint marketing with, and discrimination in favor of, a BOC's in-region electronic publishing separated affiliate. Participation by a BOC in an in-region electronic publishing joint venture does not eliminate the potential for anticompetitive behavior that

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<sup>3</sup> Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996) ("Explanatory Statement").

exists with BOC in-region electronic publishing separated affiliates.

- The Commission must require, pursuant to section 274, that in-region electronic publishing joint ventures and separated affiliates operate independently from the BOC. The independent operation requirement involves specific obligations which the Commission must address in its regulations. The application of the section 274 safeguards must be applied strictly, permitting limited exceptions only where the statute expressly provides for them. These exceptions must be narrowly construed and must not undermine Congress' overriding mandate of independent operation.
- The Commission must guard against discrimination by requiring BOC compliance with the heightened nondiscrimination standard contained in section 274.
- To diminish the opportunities for monopoly leveraging, the Commission must prohibit joint marketing of a BOC's local exchange services with the in-region electronic publishing services of its separated affiliate or joint venture.

Time Warner cautions the Commission against the existing potential for circumvention of the section 274 safeguards. Absent diligent and effective Commission regulation and implementation of the section 274 standards, BOCs possess the ability to evade section 274's safeguard requirements by using unseparated video affiliates to leverage the BOC's local exchange monopoly power into the electronic publishing industry. Consistent with the language of section 274, the Commission

should require that BOCs provide video services with telephony, or with electronic publishing information services, but not both.

**II. SECTION 274 LIMITS BOC ANTICOMPETITIVE CONDUCT IN ELECTRONIC PUBLISHING WHETHER PROVIDED THROUGH A SEPARATED AFFILIATE OR A JOINT VENTURE. (§§ I, III)**

Section 274 of the 1996 Act was designed to limit the BOCs' monopoly power and to prevent them from improperly allocating costs between their monopoly local exchange business and competitive in-region electronic publishing operations to the detriment of ratepayers and competition in unregulated or less-regulated markets.<sup>4</sup> In essence, section 274 seeks to prevent BOCs from leveraging their market power in order to gain an unwarranted advantage in competitive markets at the expense of monopoly ratepayers. Congress' ultimate solution for this problem is to allow competition with local exchange companies pursuant to section 251 of the 1996 Act. However, until the BOCs have demonstrated compliance with the requirements of sections 251 and 271<sup>5</sup> and the provision of local telephone service to consumers is competitive, BOCs will retain the incentive and ability to leverage their local telephone market power. As described below, BOCs possess a number of tools to accomplish this leverage, including cost misallocation, discriminatory treatment of competitors, or charging their affiliates below-market rates, thereby lessening competition.<sup>6</sup>

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<sup>4</sup> Notice at ¶ 7, 8.

<sup>5</sup> See 47 U.S.C. §§ 251, 271.

<sup>6</sup> See Notice at ¶¶ 16, 17 (BOCs also may leverage their market power by lowering the quality of service provided to their

The section 274 safeguards apply only to those electronic publishing activities of a BOC, a BOC joint venture or a BOC affiliate which utilize the local exchange services of the BOC or its affiliate for transmission.<sup>7</sup> It logically follows that because the use of a BOC's local exchange services triggers the safeguards of section 274, the out-of-region electronic publishing operations of a BOC, or its affiliates or joint ventures are not subject to section 274's safeguards (because those out-of-region operations do not use the BOC's local exchange services). Further, the BOC does not enjoy monopoly power over local exchange facilities outside its service region. As a result, the concern for BOC anticompetitive behavior in out-of-region electronic publishing activities is diminished. In sum, Time Warner's comments herein address the safeguards necessary for the in-region electronic publishing activities of a BOC, BOC joint ventures and BOC affiliates.

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competitors without a commensurate lowering of price-- the so-called "price squeeze").

<sup>7</sup> 47 U.S.C. § 274(a) ("No Bell operating company or any affiliate may engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service").



**A. BOCs Have The Incentive And Ability To Misallocate Costs And Discriminate In The Provision Of Monopoly Services. (§§ I.A, B, C)**

Strictly enforced structural separation requirements are necessary to limit BOCs' ability, if not their incentive, to misallocate to rate regulated services, the costs of entering and providing service in competitive markets. The Commission is cognizant of the fact that

[i]f it is regulated under rate-of-return regulation, a price cap structure with sharing (either for interstate or intrastate services), or a price cap scheme that adjusts the X-factor periodically based on changes in industry productivity, a BOC may have incentive to improperly allocate to its regulated core business costs that would be properly attributable to its competitive ventures.<sup>8</sup>

These problems are particularly acute where monopoly BOCs and competitive affiliates share joint and common costs. The structural separation requirements of section 274 will reduce the BOCs' ability to cross-subsidize competitive services by minimizing joint and common costs.

The Commission also acknowledges that "a BOC could potentially discriminate in providing exchange access services and facilities that its rivals need to compete in the electronic

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<sup>8</sup> Notice at ¶ 7; see also, Leland L. Johnson, Ph.D., "Reply Comments: Allocating Common Costs to Avoid Cross-Subsidy and Enable the Sharing of Benefits," Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services, CC Docket No. 96-112, Reply Comments of the National Cable Television Association, Attachment A (filed June 12, 1996) (explaining the incumbent LEC incentive to cross-subsidize in a price cap regime due to periodic reviews, sharing mechanisms and state controls).

publishing. . . market[]."9 The importance of telephone exchange access services and facilities to competing electronic publishers cannot be underestimated. By definition under section 274, in-region electronic publishers utilize BOC local telephone services. Thus, these BOC services are an essential input to the electronic publishing services offered by non-facilities-based competitors. This places BOCs in the unique position of being able to harm competitors merely by withdrawing their full cooperation. Section 274 seeks to restrain this aspect of the BOCs' market power through one of the most stringent nondiscrimination obligations in the Communications Act.<sup>10</sup> This obligation must be strictly enforced to effectuate Congress' clear intent to absolutely restrain the BOCs' ability to discriminate in this area.

**B. These Concerns Apply With Equal Force To BOC Electronic Publishing Joint Ventures. (§§ I.A, B, C)**

Section 274 makes clear that the Commission must strive to prevent the harms described above with respect to both in-region electronic publishing separated affiliates and electronic publishing joint ventures. Therefore, the Commission must ensure that the basic policy goals of section 274, allowing BOC entry into electronic publishing while preventing cross-subsidization, discrimination, and other predictable consequences of public utility vertical integration, are upheld whether a BOC enters electronic publishing through a separated affiliate or through a

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<sup>9</sup> Notice at ¶ 7.

<sup>10</sup> See infra section III.F.

joint venture. To do otherwise would be to encourage wholesale evasion of the fundamental goal of the statute.

Time Warner supports the Commission's tentative conclusion that a BOC may only enter electronic publishing through either a separated affiliate or an electronic publishing joint venture.<sup>11</sup> As the Commission correctly points out, subsection 274(a) prohibits BOCs from entering electronic publishing except through "a separated affiliate or electronic publishing joint venture operated in accordance with [section 274]."<sup>12</sup> This disjunctive form, establishing two options through which BOCs may enter electronic publishing, is repeated throughout section 274.<sup>13</sup>

The importance of applying section 274's structural separation requirements to both separated affiliates and joint ventures stems from the BOCs' ability to abuse their local telephone monopoly through either entity. Nothing about in-region joint ventures as defined in section 274 provides any effective restraint on BOCs' ability or incentive to cross-subsidize or discriminate in favor of its in-region joint venture's electronic publishing services.

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<sup>11</sup> Notice at ¶ 32.

<sup>12</sup> Id. citing 47 U.S.C. § 274(a) (emphasis added).

<sup>13</sup> See 47 U.S.C. § 274(b) ("a separated affiliate or electronic publishing joint venture shall be operated independently" from the BOC; a "separated affiliate or electronic publishing joint venture" shall be subject to the structural separation requirements; 47 U.S.C. § 274(d) (a BOC "under common ownership . . . with a separated affiliate or electronic publishing joint venture" is subject to nondiscrimination obligations) (emphasis added).

The Commission appears to reach a contrary conclusion. In the Notice, the Commission states that:

electronic publishing joint venture[] . . . provisions limit the potential likelihood that the BOCs will engage in [anticompetitive] behavior by limiting their ownership interest in the electronic publishing entity. Because much of the benefit of favoring an electronic publishing joint venture would accrue to unrelated participants in such joint venture, the gains to the BOC from such [anticompetitive] activity would be small.<sup>14</sup>

However, notwithstanding the diluted nature of the benefits, some benefits will accrue to the BOC from anticompetitive behavior. Further, the statutorily limited time period during which section 274 restrictions apply creates an additional incentive to engage in anticompetitive activities: to the extent that a BOC can create a strong electronic publishing joint venture now through cross-subsidization, discrimination, anticompetitive harm to competitors, and other methods of monopoly leveraging, it will reap those benefits in less than three and a half years.<sup>15</sup> The BOCs will retain incentives to engage in anticompetitive behavior to benefit their electronic publishing joint ventures and to disadvantage their competitors in the electronic publishing industry. The limits on BOC interrelation with an in-region electronic publishing joint venture evidence Congress' knowledge of the continued incentive for BOC anticompetitive behavior with

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<sup>14</sup> Notice at ¶ 15.

<sup>15</sup> The provisions of section 274 will cease to apply after four years from the date of enactment of the 1996 Act. See 47 U.S.C. § 274(g)(2).

in-region electronic publishing joint ventures. The Commission must implement section 274 in a manner that recognizes and seeks to minimize the incentives of BOCs to assist their in-region electronic publishing joint ventures through anticompetitive means.

The inherent potential for a BOC to leverage its local telephone monopoly power through a joint venture leads Time Warner to strongly disagree with the Commission's characterization of the electronic publishing joint venture as an "alternative" to structural separation.<sup>16</sup> Congress did not treat joint ventures as an alternative to structural separation, but, rather, applied the structural separation requirements to in-region electronic publishing joint ventures. Section 274(b) expressly requires that "[s]uch separated affiliate or joint venture and the Bell operating company with which it is affiliated" are subject to the separation requirements thereafter listed.

Finally, the fact that section 274 allows BOCs to "provide promotion, marketing, sales, or advertising personnel and services"<sup>17</sup> to a joint venture should not be interpreted in a manner which eviscerates the structural separation obligations imposed elsewhere in section 274. Rather, this language should be interpreted and implemented as Congress intended -- a limited

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<sup>16</sup> See Notice at ¶ 15 (the electronic publishing joint venture provisions "represent an alternative to structural separation as a means of addressing the potential problems of improper cost allocations and discrimination").

<sup>17</sup> 47 U.S.C. § 274(c)(2)(C).

exception to the otherwise applicable structural separation obligations. As set forth more fully below, Time Warner believes that the Commission should implement section 274(c)(2)(C) by requiring that BOC in-region electronic publishing joint ventures fully comply with the obligation to "operate independently." In sum, to give full effect to Congress's regulatory framework and to uphold the policy goals underlying section 274, the Commission must ensure that in-region joint ventures do not become vehicles for BOC circumvention of section 274 safeguards.

**III. THE STATUTE REQUIRES THE COMMISSION TO STRICTLY ENFORCE THE STRUCTURAL SEPARATION, NONDISCRIMINATION AND JOINT MARKETING REQUIREMENTS OF SECTION 274. (§§ II, III)**

Section 274 reflects a Congressional judgment that BOCs should be allowed to enter the electronic publishing business subject to strict separation between the BOCs' monopoly and competitive services and other limitations on the BOCs' abilities to engage in anticompetitive conduct. The requirements imposed by section 274 can be grouped into three categories: (1) the required degree of separation between the monopoly and competitive services; (2) the prohibition of discrimination; and (3) limitations on joint marketing. The overarching design of these safeguards is explained in the first sentence of section 274(b), which states that "[a] separated affiliate or electronic publishing joint venture shall be operated independently from the Bell operating company."<sup>18</sup>

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<sup>18</sup> Id. at § 274(b).

The independent operation requirement is a specific obligation that requires amplification and implementation by the Commission. It is not a mere qualifier of other statutory restrictions. Further, the Commission must preserve the independent operation obligation when implementing the additional section 274 separation requirements. Specifically, the other requirements may not be so broadly construed as to render meaningless the express congressional mandate that a BOC operate independently of its electronic publishing separated affiliate or joint venture. Hence, the independent operation requirement constitutes both a specific obligation and a pervasive guideline for the implementation of the other section 274 requirements.<sup>19</sup>

**A. Section 274 Requires Independent Operations. (§ III.B)**

The Commission properly recognizes that the implementation of the independent operation requirement may necessitate the adoption of additional regulatory requirements.<sup>20</sup> In so doing, the Commission should apply the standards for independent operation advocated by Time Warner in the Non-Accounting Safeguards Rulemaking.<sup>21</sup> To operate independently, the BOC and

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<sup>19</sup> The Commission requests comment on whether the "operate independently" requirement contained in section 274(b) has a different meaning for separated affiliates than for electronic publishing joint ventures. See Notice at ¶35. The statutory language offers no basis for concluding that separated affiliates and joint ventures are to be subject to different "operate independently" requirements. To the contrary, both separated affiliates and joint ventures must comply with the Commission's implementation of Congress' mandate that they operate independently from the BOC.

<sup>20</sup> See Notice at ¶ 35.

<sup>21</sup> See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as

its separated affiliate or joint venture must do business with one another on an arm's length basis, as if they did not share common ownership or control. Further, the Commission should prohibit the separated affiliate or joint venture from constructing, owning, or operating its own transmission facilities. Rather, the Commission should require the separated affiliate or joint venture to purchase its capacity from the regulated carrier under tariff to ensure that local exchange monopoly power is not leveraged into the provision of electronic publishing.

In addition, the in-region electronic publishing separated affiliate or the joint venture: (1) must not lease or share physical space collocated with regulated transmission facilities used to provide basic service; (2) must not share computer facilities with the local exchange carrier; (3) must not develop software jointly with the regulated entity; and (4) must not market any other equipment or services to any affiliate. These safeguards will reduce the abilities and incentives of BOCs to leverage their local exchange monopoly power into the developing competitive market of electronic publishing.

**B. Exceptions In Section 274 To The Independent Operation Obligation Should Be Construed Narrowly. (§ III.B)**

In its comments in the section 272 Non-Accounting Safeguards Rulemaking, Time Warner indicated that "the only exceptions made

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amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, Comments of Time Warner Cable at 17-20 (filed Aug. 15, 1996) ("Time Warner Non-Accounting Safeguards Comments").



[to the independent operation requirement] should be those that flow from the statutory exceptions themselves."<sup>22</sup> In this Rulemaking, Time Warner maintains that identical standards for independent operation must apply to both the separated affiliate and the joint venture, with only those exceptions expressly listed in the statute. Further, the Commission must interpret those exceptions to give force to the independent operation requirement.

The overriding import of section 274 involves strict safeguards limiting the relationship between the BOC and its in-region electronic publishing separated affiliate and between the BOC and its in-region electronic publishing joint venture. However, the section does contain limited exceptions for joint ventures. Section 274(c)(2)(C) permits the BOC to provide very limited "promotion, marketing, sales or advertising personnel and services" to the joint venture. The BOC may not provide these personnel or services to its separated affiliate. These exceptions constitute the only differences in the regulatory treatment of a separated affiliate and a joint venture.

The BOCs will argue that, by negative implication, section 274(b)(5) permits them to share officers, directors, employees, and property with the in-region joint venture. In addition, the BOCs will assert that section 274(b)(7), once again by negative implication, permits a BOC to hire and train personnel on behalf of an in-region joint venture, allows it to purchase, install and

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<sup>22</sup> Id. at 17.

maintain equipment and permits it to perform research and development. However, a cursory analysis of these assertions demonstrates that, if true, these "implied rights" would undermine the express independent operation requirement of section 274(b). Where the application of the "negative pregnant rule" of statutory construction would lead to an unreasonable result, the rule does not apply. Because the negative pregnant rule of construction, if applied, would undermine the central tenet of section 274, namely the independent operation requirement, it may not be applied. As a result, sections 274(b)(5) and 274(b)(7) create no additional exceptions to the independent operation requirement as applied to BOC separation from in-region electronic publishing joint ventures.

The exceptions which do apply should be implemented so as not to render meaningless Congress' express intention that in-region electronic publishing joint ventures operate independently from the BOC. Broad implementation of the exception would permit circumvention of the express requirements in subsections 274(b)(1)-(9) and would impede the development of competition in the provision of electronic publishing services. Hence, the exceptions must be construed narrowly and, in all other respects, a separated affiliate and a joint venture must be regulated according to the same rules.

**C. BOC Electronic Publishing Affiliates And Joint Ventures Should Be Prohibited From Using The Name, Trademarks, Or Service Marks Of The Operating Company Under Any Circumstances. (§ III.B)**

Section 274(b)(6) provides a protection against BOC affiliates or joint ventures using the broad recognition of operating companies' names, trademarks, and service marks to market electronic publishing. The provision represents Congress' acknowledgment that permitting such practices would place non-BOC providers of electronic publishing at a severe disadvantage. This anticompetitive threat can be addressed adequately only if BOC electronic publishing affiliates and joint ventures are prohibited, under any circumstances, from using the name, trademarks, or service marks of a Bell operating company.

The Commission should clarify that this prohibition applies where a BOC shares a name, trademark, or service mark with the Regional Bell Holding Company. In such cases, the name, trademark, or service mark is the operating company's, and the Section 274(b)(6) prohibition against cross-labeling applies.

The fact that Section 274(b)(6) permits use of a name, trademark, or service mark owned by the Regional Bell Holding Company does not change this analysis. The limited exception in Section 274(b)(6) would largely vitiate the general prohibition against cross-labeling if BOC affiliates or joint ventures were permitted to use names, trademarks, or service marks that are shared by an operating company and the Regional Bell Holding Company. This is not a baseless concern. Indeed, four of the seven Regional Bell Holding Companies share names, which represent the strongest brand identity to consumers, with at

least one of their operating companies.<sup>23</sup> It makes no sense, therefore, to permit affiliates and joint ventures to use names, trademarks, or service marks that BOC operating companies share with the Regional Bell Holding Companies. Such a result clearly would violate the overarching requirement that electronic publishing joint ventures and separated affiliates operate independently of the BOC.

**D. BOCs Should Be Prohibited From Jointly Owning Goods, Facilities, Or Physical Space With Their Electronic Publishing Affiliates And Joint Ventures. (§ III.B)**

Section 274(b)(5)(B) prohibits a separated affiliate and a Bell operating company from owning "property" in common.<sup>24</sup> The term "property" is extremely broad.<sup>25</sup> At the very least, it should be interpreted, as the Commission proposes in the Notice, to preclude the joint ownership of goods, facilities and physical space by BOCs and their in-region electronic publishing affiliates.<sup>26</sup>

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<sup>23</sup> Three regional holding companies, Ameritech Corporation, Pacific Telesis Group and SBC Communications, do not share a common name with their operating companies. Another regional holding company, NYNEX Corporation, does not share a common name with one of its operating companies, New England Telephone. See 1996 Directory of Corporate Affiliations, Vol. III.

<sup>24</sup> See 47 U.S.C. § 274(b)(5)(B).

<sup>25</sup> According to Webster's Dictionary, "property" simply means "something owned or possessed." See Webster's Ninth New Collegiate Dictionary (1986).

<sup>26</sup> See Notice at ¶ 41. In the Notice, the Commission also proposes that the term "property" include "telecommunications transmission and switching facilities." See id. While Time Warner supports this proposal, it appears to be redundant, since those facilities would be included in the term "facilities."

Moreover, the Commission should interpret the requirement that BOC in-region electronic joint ventures operate "independently"<sup>27</sup> to impose a similar restriction on the joint ownership of property on BOCs and their joint ventures. The problem that section 274(b)(5)(B) addresses, namely the increased opportunities for cross-subsidy in situations where property is jointly owned, is just as serious with in-region joint ventures as it is with in-region separate affiliates.<sup>28</sup> Thus, Section 274(b) should be read to prohibit BOCs from holding any common ownership interest in any property, including goods, facilities, and physical space, with either an in-region electronic publishing affiliate or an in-region joint venture.

**E. The Commission Should Establish The Maximum Available Protections Against Sharing Of Equipment And Personnel Between BOCs And Their Affiliates And Electronic Publishing Joint Ventures. (§ III.B)**

Subsections (A) through (C) of Section 274(b)(7) establish protections against the sharing of equipment and personnel between BOCs and their in-region electronic publishing affiliates. These provisions are clearly designed to prevent cross-subsidy, which is very difficult to detect where equipment and personnel are shared. Given the damaging effects such misallocation would have on competition, section 274(b)(7) should be implemented in a manner that establishes the maximum protection against cross-subsidy.

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<sup>27</sup> See 47 U.S.C. § 274(b).

<sup>28</sup> See supra Section II.B.

First, section 274(b)(7)(A) unambiguously prohibits BOCs from training or hiring personnel on behalf of their in-region electronic publishing affiliates. This provision does not permit, as the Commission suggests it might,<sup>29</sup> an exception where the operating company and its in-region electronic publishing affiliate are engaged in permissible joint marketing activities. If Congress had intended to create such an exception, it was fully capable of doing so.<sup>30</sup> The fact that it did not indicates that there should be no exceptions to the prohibition in subsection (A) against joint hiring and training.

Second, although section 274(b)(7)(B) allows BOCs to provide telephone service to their in-region electronic publishing affiliates, they must not be permitted to do so in a discriminatory manner.<sup>31</sup> Accordingly, the Commission should require that BOCs provide unaffiliated electronic publishers with the same access to wireline telephone exchange service that they provide to their in-region separated affiliates or joint ventures.

Third, section 274(b)(7)(C) is clear on its face: BOCs may not perform research and development on behalf of in-region separated affiliates. The Commission should simply prohibit BOCs, under any circumstances, from sharing any research and

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<sup>29</sup> See Notice at ¶ 45.

<sup>30</sup> See 47 U.S.C. § 274(c)(2)(C) (explicitly permitting sharing of personnel for joint marketing between operating companies and electronic publishing joint ventures).

<sup>31</sup> See 47 U.S.C. § 274(d); see also *infra* Time Warner's discussion of this provision in section III.F..

development work or results with their in-region electronic publishing affiliates.<sup>32</sup>

Finally, although the provisions of section 274(b)(7) do not expressly apply to BOC in-region electronic publishing joint ventures, it is sound policy and fully within the Commission's authority to apply the section 274(b)(7) cross-subsidy protections to in-region joint ventures to the extent permitted by the statute. Thus, the requirement that in-region joint ventures operate "independently" should be interpreted to prohibit a BOC from (1) hiring or training personnel on behalf of its in-region electronic publishing joint venture, except as specifically permitted by section 274(c)(2)(C),<sup>33</sup> (2) performing the purchasing, installation, or maintenance of equipment on behalf of an in-region electronic publishing joint venture, or (3) performing research and development on behalf of an in-region electronic publishing joint venture.

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<sup>32</sup> Additionally, the Computer II rules precluding specific research and development by the regulated entity on behalf of the competitive affiliate should be adopted here. This approach obviates the need to determine whether research may be of potential use to the affiliate, as discussed in the Notice. See Notice at ¶ 46. The latter standard would in any case be difficult to enforce.

<sup>33</sup> Section 274(c)(2)(C) states that a "Bell operating company participating in an electric publishing joint venture may provide promotion, marketing, sales, or advertising personnel and services to such joint venture." 47 U.S.C. § 274(c)(2)(C).

**F. The Commission Should Faithfully Implement Section 274's Absolute Prohibition Of Discrimination With Regard To The Provision Of Basic Telephone Services To Electronic Publishers. (§ III.D)**

Section 274(d) provides that BOCs under common ownership or control with an electronic publishing separate affiliate or joint venture must provide network access and interconnections for basic telephone service to electronic publishers at just and reasonable, tariffed rates which are no higher on a per-unit basis than the rate charged any other separated electronic publishing affiliate or electronic publisher.<sup>34</sup> Several potential issues are raised by this provision.

First, section 274(d) clearly prohibits BOC price discrimination with regard to network access services and basic telephone service interconnection.<sup>35</sup> BOCs may not charge electronic publishers rates for these services which differ from rates charged any other electronic publisher.<sup>36</sup> Thus, the Commission's tentative conclusion that section 274(d) requires uniform rates is correct.<sup>37</sup> In any event, the Commission should

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<sup>34</sup> 47 U.S.C. § 274(d).

<sup>35</sup> Time Warner concurs with the Commission's tentative conclusion that section 274(d) requires that BOCs provide "unaffiliated electronic publishers with access to 'any wireline telephone service' and/or interconnection to any 'wireline telephone exchange facility.'" See Notice at ¶ 66; see also 47 U.S.C. § 274(i)(2) (defining the term "basic telephone service" for the purpose of section 274).

<sup>36</sup> This conclusion is unassailable. If the BOC offers a rate to a electronic publisher that is lower than the existing rate, then the existing rate will be higher than the offered rate, which is contrary to the statute. A BOC offering an electronic publisher a rate higher than the existing rate clearly is in violation of the statute.

<sup>37</sup> Notice at ¶ 67.



not entertain BOC arguments that section 274(d) admits of price discrimination which is "just and reasonable." Section 274(d) absolutely prohibits price discrimination.

Second, section 274(d) requires that services be offered at "just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation)." <sup>38</sup> This language clearly requires that BOCs charge tariffed rates for services so long as the Commission requires such rates to be tariffed. However, the requirement that rates be just and reasonable and nondiscriminatory plainly survives any eventual relaxation of tariff requirements. In order to ensure that BOCs offer just and reasonable and nondiscriminatory rates, the Commission should require that BOCs publish the rates charged electronic publishers by filing a list of rates charged with the Commission. This rate list should be updated as the rate changes and should be provided to any electronic publisher upon request.

The Notice also seeks to apply the Computer Inquiry III safeguards, including Open Network Architecture ("ONA"), unbundling and network disclosure requirements. <sup>39</sup> Despite the fact that these obligations have not been useful to enhanced service providers generally, Time Warner believes that, if coupled with nondiscrimination and separation requirements, these safeguards may be beneficial to electronic publishers. Time Warner thus supports the Notice's proposal to apply them here.

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<sup>38</sup> 47 U.S.C. § 274(d).

<sup>39</sup> Notice at ¶¶ 65-66.